No. 7750

# United States Circuit Court of Appeals

For the Ninth Circuit

MUI SAM HUN,

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

Appeal from the United States District Court for the Territory of Hawaii.

## BRIEF FOR APPELLEE.


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### I.

### STATEMENT OF THE CASE.

This is an appeal from the refusal of the District Court to issue a writ of habeas corpus in behalf of a Chinese, Mui Sam Hun, excluded by a Board of Special Inquiry from admission to the United States. He asserted birth in the Territory of Hawaii. The error

assigned presents a single issue: Is the applicant's "proof" of Hawaiian birth such that the failure of the Board to be moved thereby constituted a manifest abuse of discretion? (*Chin Ching v. Nagle* (9th C. C. A., 1931), 51 F. (2d) 64.) Or, to adopt the language of this Court: Does the evidence so conclusively establish the identity and birthplace of claimant that the order of exclusion should be held arbitrary or capricious? (*Jue Yim Ton v. Nagle,* 1931, 48 F. (2d), 752.)

1. What claim did the applicant make?

Mui Sam Hun, assertedly 32 years of age, arrived at the Port of Honolulu on July 27, 1934, claiming birth in Honolulu on May 5, 1902, and departure therefrom at the age of four (4) years, with his mother, on February 13, 1906, on the SS. "Mongolia". He stated that his father had died in 1904, in Honolulu. His only recollected residence was in Lung Tow Wan village, China, where his wife and four children remain. He had obtained for steamship purposes an affidavit executed by Mui Gum Yet in Honolulu on March 9, 1934, certifying the birth of "Sam Hun Mui" "in the Territory of Hawaii in the year 1902" (R. p. 64). This was the only documentary evidence of his birthplace and identity which he offered. He stated that he had no brothers or sisters, no family photographs, no surviving uncles or aunts—in short, no living relative save his mother, Jow Shee, in China.

**2. What proof did the applicant propose to offer?**

First, necessarily, the applicant by his own testimony could afford the Board no very definite assurance of his alleged birthplace. He assertedly left Hawaii well before the age of recollection. In this respect, he is not to be distinguished from those of his race born and bred in China. Since he must assert the fact at issue upon the authority of others, his oath on that point could have no validity. His asseveration, no matter how positive, cannot render him liable in law; it does not, in consequence, satisfy the requisites of proof. "He could not possibly know the fact": *Ex parte Chin Hin et al.,* 1915, 227 Fed. 131, 133. "From the very nature of the issue he could have no positive knowledge upon this point": *Ark Foo v. U. S.* (2nd C. C. A. 1904), 128 Fed. 697. And *Chin Lund v. U. S.* (6th C. C. A. 1925), 9 F. (2d), 283, 284, citing *Lee Sim v. U. S.* (2d C. C. A.), 218 Fed. 432, 435, suggests the incompetence of such testimony. The Board's rejection of this element of the applicant's proof, therefore, was not arbitrary, nor "evidence of unfairness": *Wong Fat Shuen v. Nagle* (9th C. C. A. 1925), 7 F. (2d) 611.

The applicant named two witnesses. He stated there were no others who could testify in his behalf (R. p. 34). It then developed that he had seen each of these witnesses on one occasion only in his lifetime for a period of ten minutes, within the past two years; and that each witness had last seen him, admittedly, if at all, as an infant in Honolulu (R. pp. 34-37).

3. At this juncture the Board faced a situation fraught with difficulties that have not escaped the sympathetic attention of this Court (*Wong Fook Jung v. Weedin,* 1926, 15 F. (2d) 847):

> "When we consider the ease with which an impostor could set up the claim made by appellant, the difficulty, if not the impossibility, of refuting it, and the fact that for 40 years he has resided in China, is married, and has grown children, but has never before sought entry into the United States, or taken any steps to establish citizenship, we think the testimony must be scrutinized with great care, and, doing so, we concur in the conclusion reached by the lower court that appellant has not sustained the burden of proof; at least, upon such a record the courts cannot with propriety disturb the finding of the immigration officials to that effect."

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## II.

### THE RECORD BEFORE THE BOARD OF SPECIAL INQUIRY.

1. What does a scrutiny of the applicant's own testimony reveal, heeding the admonition of "great care?"

(a) First, there is a serious lack of information and absence of corrobative proof. He gave no account of what his mother would have told him, if his claim were true, concerning his life in Hawaii. Indeed, if she had that information, it is fair to presume that a reasonable man, approaching a situation requiring him to prove his claim of American birth, would have fortified himself with some details from that mother, who still lives. Instead, he was unable to tell the

Board when his father died except "during 1904"; he asserted the remains were moved to China, but when and by whom he did not know (R. p. 25). He even pretended not to know where his father was born: "In China, I don't know where" (R. p. 28).

Note with what difficulty the Board finally obtained from an unwilling witness the place of his father's birth (R. pp. 28-29):

> "Q. How did your mother come to settle in Lung Tow Wan village on her return to China?
>
> A. That is my paternal grandfather's village * * *.
>
> Q. If Lung Tow Wan was your paternal grandfather's village, was it not also your father's village?
>
> A. Yes.
>
> Q. Are you positive your mother was born in the same village as your father was born?
>
> A. I believe it is, I don't know.
>
> Q. Is it not an unusual thing for a Chinese not to know what village his father comes from in China?
>
> A. My father died when I was a small boy and I wouldn't know about it.
>
> Q. Was or was not your father from Lung Tow Wan village?
>
> A. I am not sure—I think he was."

This applicant offered no proof of this alleged parent's death, and although one witness said the father was buried "at Manoa" (R. p. 43), a Chinese cemetery in Honolulu, no effort was made to produce this burial record, or to ascertain its availability. Thus

even this slender corroboration is withheld from the Board. Why?

(b) *Was the testimony of the applicant credible?* (1) It will be observed that he gave the date of his birth by our calendar reckoning (R. p. 24), although he knows no English. He was asked (R. p. 25): "Q. What is the Chinese date for your birth?" He answered: "I don't know. My father told me I was born May 5, 1902." *But his father had died when the applicant was assertedly two years of age?* Again, he gave the exact English date for his 1906 departure (Chairman's Summary, R. p. 57). But as to even the *year* of his marriage, and the *years* of his children's birth he was unable, or refused, to state the same, either in Chinese or American reckoning (R. p. 32). What then was the source of applicant's information of the American calendar date for his birth and departure, of which he himself had no independent knowledge? Certainly not his father, as claimed. But this was not the only indication of a fabricated claim which rendered the Board suspicious, and therefore rightfully doubtful.

(c) He was shown the affidavit of Mui Gum Yet (R. p. 39). He did not know who made it. He was told the affiant's name, as asked: "Q. Did you ever hear of or know of a man by that name?" The record is (*ibid.*):

> "A. No. (changes) My mother told me there was a man by that name living here who had never been to China; I don't know him personally."

Yet the second witness said (R. p. 53): "Q. Do you know whether or not Mui Gum Yet really knew the applicant as he claims? A. Yes, I do."

**2. There is, therefore, this difficulty in the record.**

When the witnesses offered by the applicant proved unsatisfactory, the Board made every effort to locate Mui Gum Yet, the affiant of March 9, 1934, whose sworn statement made in Honolulu had been forwarded to China for the applicant's use in obtaining steamer passage. Gum Yet, at least, had registered an unreserved oath; here was one witness who had risked responsibility in law. But he was discreetly not available. The second witness is asked (R. p. 53):

> "Q. Do you know a man in Honolulu named Mui Gum Yet?
>
> A. Yes, he is a man about my age, but he is probably on the island of Molokai, from what I have heard, planting pineapples. * * *
>
> Q. Why was he not produced as a witness?
>
> A. I don't know—he is planting pineapples.
>
> Q. Can we reach him in any way?
>
> A. *No, he is an itinerant—I don't know where he is located.* "

Yet this itinerant four months earlier was located by the applicant's mother, assertedly through correspondence from China (R. p. 39). This Court has held that the failure of a claimant to call a possible material witness reasonably raises a presumption against the *bona fides* of his claim: *Hung You Hong v. U. S.*, 1933, 68 F. (2d) 67.

3. **Was the Board arbitrary in refusing to be moved by the attempted assurance of the witness Lee Wai Shoon?**

At the outset it will be noted, with respect to both witnesses, that the Board was afforded little background on which to seek cross-corroboration. The visit of each witness was limited to a single ten minute occasion. No detailed knowledge, then, could be expected of them concerning applicant's residence and family in Lung Tow Wan. There were no surviving relatives to check upon. The record was bare of all facts, except a few easily concocted and remembered, outside of the departure-manifest record. And yet there were discrepancies.

(a) Lee Wai Shoon came to Hawaii in 1894, and first returned to China in 1933. He claimed to have known an infant son of one Mui Ow Gut, who died "here about 30 years ago" (R. p. 43). This witness did not state any facts which were not comprised in the meagre testimony of the claimant. *It affirmatively appeared that from 1906 to 1933 he had no knowledge that the widow and her child of the said Mui Ow Gut had left Hawaii.* Thus (R. p. 43):

> "Q. What became of Mui Sam Hun and Jow Shee after the death of Mui Ow Gut?
>
> A. She took their son Mui Sam Hun to China when he was four years old.
>
> Q. Do you know about the date of their departure and the ship?
>
> A. No.
>
> Q. How do you know that these people went back to China when the applicant was four years old?

A. *Because some of their neighbors told me after I had arrived in China on my visit.*"

(b) This witness contradicted the applicant on the one slender point where their testimony met concerning the ten minute visit "between 10 and 11 o'clock in the morning" only a year before. This witness says (R. p. 44):

> "A. I happened to call at the home of Joe Jow who told me that a few houses from his in the same village resided Mui Sam Hun, the son of Mui Ow Gut. While I was at Joe Jow's house Mui Sam Hun's mother came to the door *and was introduced and she led me to her house and there I saw Mui Sam Hun.*"

Now the applicant had said (R. p. 35), "* * * he came to my house to visit my mother, who is his friend." It is submitted that these two statements do not relate to the same state of facts.

(c) Should this witness' asserted identification of the claimant as the infant known in Honolulu before 1906 have been accepted by the Board? First, the witness did not recall the mother; they were "introduced". He could not of course recall the infant in the man (R. p. 45), and so stated: "If his mother had not told me I would not have known (him)". Conceding that Wai Shoon did know Jow Shee in 1904, and that he was in good faith—how was the Board protected against an imposition by the mother upon this witness? How was the witness to know, and the Board to determine that Jow Shee had not foisted

a child of Chinese birth (either her's born after 1906, or another's) upon a credulous and willing old man, with a failing memory? "Things which happened 2 or 3 months past I *can* remember" (R. p. 47). It is submitted that the executive Board was not required to indulge in speculation and supposition; and that its refusal to do so cannot be stigmatized as bias or prejudice. This, it is believed, the Ninth Circuit Court of Appeals has determined, and also the Supreme Court: *Hung You Hong v. U. S.,* above; *Tang Tun v. Edsell,* 1912, 223 U. S. 673.

(d) It is clear that the capacity of this witness' memory became highly material. Appellant complained that the Board elected to test Wai Shoon's recollection (and possibly his credibility), by ascertaining if he could confirm his earlier testimony on major points in other cases before the Immigration Service at Honolulu. It appeared that of about ten such cases, two particular files were used, Nos. 4382/1312 and 4382/1868 (R. p. 46). Of his explanation that he remembered then but had forgotten now, the Board only commented that it "destroyed the effectiveness of his testimony" (R. p. 58), meaning perhaps whatever effectiveness it could have, even if believed. This appraisal, and the right to make it, would seem to be within the province of the Board; and not to be characterized as "the effrontery of suggesting that the (witness) is a perjurer and a crook" (Appellant's Brief, p. 10).

(e) But appellant seeks to impose a more serious misapprehension. He implies (Brief, p. 9) that the

files used above in testing the witness Wai Shoon were not in the record before the Secretary of Labor. On the contrary, the letter of transmission of the record on appeal (R. pp. 62-63) noted as inclosures the identical files, among others, above noted, which *were* before the Secretary; and doubtless if appellant's Praecipe for Transcript (R. p. 90) had requested the same, these items would be before this Court, as they were before the Court below.

**4. A scrutiny of the testimony given by the second witness, Wong Wah Heen, strongly tends to indicate a concerted fabrication in this case.**

His testimony was strangely similar to that of Wai Shoon. He also had lived in Hawaii since *1894;* he also knew an infant son of one Mui Ow Gut who died *"about 30 years ago"* in Honolulu at the age of *"30 odd or 40 years"* (R. p. 50). He also did not know when the father's remains were shipped to China. And strangely, he also did not know of the departure of the widow and her child until he went to China in 1932. Note how he put the dates (R. p. 51):

> "Q. When did she go back to China?
> A. At the age of 35 years, I don't know the year."

Would he reasonably have known the intimate fact of a woman's age, whose absence passes unnoticed for 26 years, and be unable to state the actual year? *Did he use this figure of "35" because the manifest record so shows, and he knew or had been informed that it did so show?* But continuing, he also met the appli-

cant for "about ten minutes", also in the morning at about ten o'clock (R. p. 52). He improved on his forerunner in one respect: he claimed he recognized or knew the mother by the fact of her residence in the village, and that he went to call on her. But there was necessarily the same failure to identify this claimant as the person whom he may have known as an infant in Honolulu before 1906. This similarity of facts suggested an efficient device in the economy of memory, though somewhat lacking in ingenuity. It may be here a contrivance devised to defeat any serious "discrepancies". But does it do honor to the perspicacity of the Board, or of this Court to whom the claimant now appeals?

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## III.

### SUMMARY OF THE FACTS.

1. The salient points of this record are four: (1) The claimant himself could offer no valid corroboration of his claim of Hawaiian birth; and did not offer any proof, directly or otherwise, of his identity. (2) The witness Lee Wai Shoon did not supply these deficiencies; he did not know after the lapse of 27 years either the mother or the son. His information was hearsay (there is no deceased declarant in this case) as to the claimant's *identity, his departure, and his birth.* (3) The witness Wong Wah Heen was similarly unable to identify this claimant as an infant known to him before 1906 in Honolulu, and of whose

departure he had no information until he visited China in 1932. (4) Lastly, the appellant did not produce the affiant Mui Gum Yet, who was avowedly, in view of his sworn statement which was in evidence, a possible material witness; though engaged in nothing more urgent than planting pineapples, and in the relatively restricted boundary of a small island, he "cannot be found".

2. This is the state of the "evidence". Appellant disregards it, perhaps naturally, and argues from a summary headed "Case informally discussed by the Board" (R. p. 57) that the executive action can be attributed only to "unfounded suspicion". He appeals to the generous language of the Supreme Court in the decision of *Kwock Jan Fat v. White,* 253 U. S. 454, of which it must be noted in all candor, that those sentiments as a rule of guidance in these cases are *dicta* except in reference to a situation, comparable to that which the Supreme Court therein ruled on, where a Board of Special Inquiry commits so manifest an abuse of discretion and denial of due process as to fail to make of record all the testimony which it considered. That the succeeding decisions of that Court have made this plain is too well known to require citations.

3. Appellant, for the first time, here complains of three alleged improprieties not noted by him in his petition for the writ nor in his brief before the trial court, namely: (1) That the Board Chairman, although with expressed reservation, referred to two other cases of a nature similar to the applicant's

within the current week. (2) That the Board Chairman drew an improper inference from the witnesses' disclosed inability to recall major facts testified to in other cases. (3) That the Board regarded with disfavor the fact that these witnesses each disclaimed having met any former resident of Hawaii in a signed statement to an Immigrant Inspector on their recent return from China.

It would seem plain from the record before the Board that it did not, and could not, regard these points as decisive of the instant claim. The motion to exclude plainly states (R. p. 58): "From the evidence presented I am not convinced that the present applicant Mui Sam Hun was born in this country". The Board *acted* on *inadequacy;* it noted the above as *important,* but not *controlling.* The Board of Review did not depart from this view (R. p. 21, next to last paragraph); nor did the trial court (R. p. 78, last paragraph).

At best appellant's contention suggests only that the Board was wrong in considering these points, and not that such regard was a manifest abuse of discretion. The issue made is: With what importance or emphasis could the executive Board fairly regard the considerations noted? Of the executive's latitude in this respect, when its action is challenged in the courts, it is submitted that the Supreme Court has, over a considerable period, spoken clearly:

> "* * * we cannot assent to the proposition that an officer or tribunal, invested with the jurisdiction of a matter, loses that jurisdiction by not

giving sufficient weight to evidence, or by rejecting proper evidence, or by admitting that which is improper."

*Lee Lung v. Patterson* (1902), 186 U. S. 168, 176.

"* * * We do not discuss the evidence; * * *.

"The denial of a fair hearing is not established by proving merely that the decision was wrong. (Here it is argued the *method* of arriving at the decision was wrong) Chin Yow v. U. S., 208 U. S. 8, 13. This is equally true whether the error consists in deciding wrongly that evidence introduced constituted legal evidence of the fact or *in drawing a wrong inference from the evidence.* * * * Under the circumstances (of an otherwise fair hearing) mere error, even if it consists in finding an essential fact without adequate supporting evidence, is not a denial of due process of law." (Italics and parenthetical matter supplied.)

*U. S. ex rel. Tisi v. Tod,* 1924, 264 U. S. 131, 133, 134.

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## IV.

### APPLICATION OF THE LAW TO THE INSTANT FACTS.

1. The validity of the present exclusion order does not rest upon a successful showing that the record adduced by this claimant and his witnesses contains within itself the seeds of its own destruction. It was not necessary that the Board should have succeeded in developing intrinsic proof of the invalidity of this

claim out of the mouths of its proponents. In fact, this is not to be expected, nor is it required, for the Board had no duty *to disprove* the claim advanced nor to impeach the witnesses. This Court, long since, observed in this connection:

> "* * * The means of showing this (native birth) are presumably in his own control. It would be extremely inconvenient, and probably in most instances, impracticable, for the government to bring proof of the negative fact that the respondent is not within the exemption. Such circumstances are the basis of the rule of evidence which devolves the burden (of proof) on the party who presumably has the best means of proving the fact; * * *" (Parenthetical matter supplied.)
>
> *U. S. v. Chun Hoy,* 1901, 111 Fed. 899, 902.

Since the evidence, then, in these cases, may be entirely that of the applicant, no basis is afforded for the rule, propounded by appellant (Brief, p. 16), that "he need make out his case by no more than a fair preponderance of the evidence". This argument assumes an adversary proceeding, with evidence for, and against, which does not exist.

2. It follows that it *is* a question, in these cases, of the adequacy and sufficiency of a claimant's proof, not of its "preponderance". Nor can the appellant validily dissent to the view of the court below that the claimant's proof before the Board was required to be "clear and convincing" before judicial intervention was authorized. This is, in one instance, the lan-

guage of a Circuit Court, and, it is ventured, the general purport of the unexpected weight of authority:

> "* * * The only question before us is whether the evidence in support of the father's citizenship was so clear and convincing that the refusal to accept it was arbitrary and unfair."
>
> *Flynn ex rel. Lum Hand v. Tillinghast,* (1st C. C. A. 1932), 62 F. (2d), 308, 309.

The Board therefore, it is submitted, had a duty to accord this applicant a fair hearing, and to afford him every opportunity to present his proof. It was then its duty, without bias or prejudice, or preconceptions, to weigh that evidence, not by any comparative balance of pro and con (as none existed), but by a reasonable appraisal of its adequacy, its probative value, and its sufficiency to support a determination by a responsible fact-finding body. The record made here by the appellant before the Board, it is believed, left the issue of his Hawaiian birth and his true identity plainly in doubt. The Court may feel this understates the character of this record; but it is enough. If so, the disposition of this controversy is indicated by the oft-repeated rulings of this Court, as stated in *Chin Share Nging v. Nagle,* 27 F. (2d), 848, 849, and recently noted in *Haff v. Der Yam Min,* 1934, 68 F. (2d), 626, 627:

> * * * "if there is a possibility of disagreement among reasonable men as to the probative effect of the discrepancies or contradictions in the testimony of the witnesses, the finding of the ad-

ministrative board will not be disturbed. Chin Wing v. Nagle (C. C. A. 9) 55 F. (2d), 609, 611.

"The conclusions of administrative officers upon issues of fact are invulnerable in the courts unless it can be said that they could not reasonably have been reached by a fair minded man, and hence are arbitrary."

Respectfully submitted,

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Due service and receipt of a copy of the foregoing Brief is hereby admitted this 27 day of March, 1935.

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